

## **REMARKS/ARGUMENTS**

### **I. Introduction**

This amendment responds to the office action dated February 22, 2008.

The Examiner rejected claims 1-11, 13, 14, 25-27, 50-53, 57, and 60 under 35 U.S.C. § 103(a) as being unpatentable over the combination of Herz, U.S. Patent No. 6,020,883, in view of Finseth, U.S. Patent Number 6,754,906. The Examiner rejected claims 15, 28, 59, and 61-64 under 35 U.S.C. § 103(a) as being unpatentable over the combination of Herz, U.S. Patent No. 6,020,883, in view of Finseth, U.S. Patent Number 6,754,906, and in further view of Graves, U.S. Patent No. 5,410,344. Each of these rejections maintain those made in a prior office action, and to which the applicant responded in an amendment filed September 7, 2007 and an RCE dated January 17, 2008.

In each of the applicant's filings, the applicant included several detailed arguments as to why the respectively cited combinations failed to disclose any of the claimed inventions. The present office action ostensibly addresses the applicant's arguments of record, but in each instance the Examiner either misconstrues the applicant's arguments, cites portions of the cited prior art that actually reinforce the applicants arguments, or misstates the disclosure of the prior art.

### **II. Rejection of independent claims 1, 10, 25, 50, 57, and 60**

#### **A. Independent claim 1**

Independent claim 1 broadly claims a method that initially receives "user attribute information that includes user preferences" as well as available "program information" that includes "attributes each corresponding to a respective one of said user preferences." Claim 1 also specifies three additional features that pertain to the program attributes and user preferences. First, both the user "preferences" and the program "attributes" are each

arranged in hierarchical levels including at least a first level and a second level where said second level of said (user preferences/program attributes) includes (preferences/attributes) descriptive of one or more (preferences/attributes) of said first level at a finer level of detail, wherein said first level includes (preferences/attributes)

that together encompass all (preferences/attributes) of said second level, and wherein at least one of said (preferences/attributes) is at a first level and at least two of said (preferences/ attributes) are at a second level.

Second, the user preferences are capable of indicating any selected one of a positive, negative, or neutral desirability, i.e. each preference can indicate that the user desires the particular preference, is averse to the particular preference, or does not care. Third, the claimed method “jointly processes” the levels of the user “preferences”, and “jointly processes” the levels of the program “attributes” so as to automatically “determine the desirability” to the user of available programming.

The Examiner asserts that the limitations of claim 1 are an obvious combination of Herz and Finseth. Specifically, the Examiner contends that Herz discloses all of the limitations of claim 1 *except* arranging the *program attributes* according to the claimed hierarchy, and that Finseth discloses this missing limitation. Thus, according to the Examiner’s rejection, Herz allegedly discloses arranging the *user preferences* in the claimed hierarchy. As explained below, this is incorrect.

Before discussing the particulars of the prior art upon which claim 1 was rejected, the applicant notes that in the previous amendment, two separate arguments were made against the Examiner’s rejection of claim 1. The first argument was that the Examiner had inconsistently applied the claim term “user preferences” to two *different* features of the cited primary reference so as to ostensibly contend that Herz disclosed preferences that were *both* arranged in the claimed hierarchy *and* were capable of being expressed in any of the claimed positive, negative, or neutral terms. In particular, the Examiner first argued that the claim term “preferences” reads on what Herz describes as a user’s “moods”, so as to aver that Herz discloses preferences that are arranged hierarchically. *See, e.g.* Office Action dated October 15, 2007 at p. 2. But in order to assert that Herz discloses preferences that receive favorable, unfavorable, or neutral values, the Examiner cites, not the moods disclosed by Herz, but actual preferences of Herz that are not arranged in the type of hierarchy claimed. *See* Id. at p. 4 (citing Herz at col. 10 lines 51-60 and col. 11 lines 6-12. The applicant argued that this “bait and switch” tactic was

impermissible, and that to properly support a prior art rejection of claim 1, the Examiner was required to cite to a *single* disclosed feature of Herz that could be considered a “user preference” and then show either that (1) Herz expressly disclosed that these ostensible “preferences” were both arranged in the claimed hierarchy and could indicate each of desirability, non-desirability, or neutrality; or (2) that it would be obvious to modify those “preferences of Herz to include both features.

Second, the applicant argued that, contrary to the Examiner’s assertion, Herz failed to disclose the type of hierarchy particularly claimed in independent claim 1, i.e. one having a second level that includes preferences or attributes descriptive of those in the first level, but at a finer level of detail, and where the first level encompasses all the attributes of the second level. In the present Office Action, though the Examiner attempts to respond to particular paragraphs of applicants prior arguments, the Examiner never actually rebuts or even addresses either of these two arguments.

The primary reference, Herz, discloses that a user of an audiovisual system, such as a consumer of television content, may have a number of profiles, each valid for specified periods of the day. *See Herz.* at col. 17 lines 26-64. Each profile comprises specific preference characteristics associated with that profile, i.e. preferences for “action” or “gore” or “drama” etc. These profiles are disclosed to be hierarchical in nature, but only in the sense that one profile may be valid for a time interval within that of a profile of a greater temporal width. Thus, any hierarchy of the profiles of Herz is a temporal hierarchy, i.e. a generic profile is the one having the greatest width of time in which it is valid, and may or may not include one or more other profiles within it, or may have a profile with a time period temporally overlapping the one of the generic profile.

Merely to explain the desirability and utility of these separate user profiles, Herz discloses that each profile may be generally considered, *in the abstract*, to correspond to a particular mood in which the user predictably feels during certain intervals of the day. As part of that explanatory disclosure, Herz describes hypothetical moods such as “peaceful” “violent” “speculative, and the like, showing that each such mood may be embodied by a separate user profile, which *itself includes* a respective set of user preferences. These profiles, according to Herz, can (and should) be distinguished from

each other in a system that seeks to accurately predict what a user might wish to see at a particular point in time.

To be clear, however, while Herz discusses these “moods”, the automated system disclosed therein does not identify or distinguish them as such – the profiles of Herz are in fact, specifically identified solely in numerical terms, i.e. profile 1, profile 2, etc, and they are distinguished from each other solely by the respective content characteristics (i.e. the real preferences) contained therein, along with the time interval for which the profile is active.

As noted above, Herz does disclose preferences, and to the extent that those preferences are assigned into one or more respective profiles that are themselves arranged hierarchically, then the preferences of Herz are also arranged hierarchically. The question to be resolved, however, is whether the hierarchy claimed in independent claim 1 reads on this arrangement of Herz. Specifically, claim 1 first requires that the preferences hierarchy include “at least a first level and a second level where said second level of said user preferences includes preferences descriptive of one or more preferences of said first level at a finer level of detail.” Plainly, this limitation does not read on the hierarchy into which the preferences of Herz are arranged. For example, assume that a generic profile/mood of Herz were to include the preferences of Action, Drama, R-rated, PG-rated, Comedy, and Stereo. This generic profile, having the largest time interval would presumably include the broadest variety of preferences. A narrower time window, i.e. a second level in the hierarchy might include Action, PG-Rated, and Surround Sound. The preferences of the second level are not descriptive of those in the first level at a finer level of detail.

Similarly, claim 1 also requires that the first level include “preferences that together encompass all preferences of said second level.” As noted in the example previously, Herz does not disclose such a hierarchy. As a further example, a user of the system of Herz may always like Westerns, Drama, and movies having a PG or lower rating, hence set a first profile valid for all hours of the day including those preferences. The same user may also establish a narrower time window, e.g. from 8pm to 4am in which R-rated and horror movies are also preferred, so that young children do not watch

such content. Thus, Herz does not disclose, either expressly, inherently, or implicitly, the claim limitation that the preferences of the first level together encompass all preferences of the second level.

These arguments are already of record, and though the Examiner ostensibly addresses them at pages 2-4 of the Office Action dated February 22, 2008, each of the Examiner's rebuttals misses the points respectively made by the applicant. First, the Examiner responds to the applicant's argument that the "moods" disclosed by Herz are analogous to profiles rather than preferences by asserting that "the moods [of Herz] can be assigned to a user in the initial survey filled out by the user." However, the disclosure cited by the Examiner actually supports the *applicant's* argument:

The *definition* of moods can be *the responsibility of the customer*. When ballots are used to create the initial customer *profiles*, each ballot may correspond to a mood. In other words, *a mood may be equivalent to a customer profile*. The generic customer profile is required . . . . Beyond that, the customer can fill out as many ballots as he/she likes to establish specific moods.

Herz at col. 17 line 65 – col. 18 line 5 (emphasis added). Thus, contrary to the Examiner's assertion, moods such as "violent" or "speculative" are not *assigned* to a user during the balloting process by the system of Herz; instead, a user simply creates a profile, and the disclosure of Herz states nothing more than that a created profile may be *abstractly* considered to correspond to some mood of the user. That mood, though perhaps known to the customer, is only identifiable by the automated system of Herz in terms of whatever specific preferences included in the profile. The system of Herz is unable to distinguish a "speculative" mood from a "peaceful" mood as such, or a "violent" mood from an "excited" mood, etc., and hence does not structurally arrange the preferences therein hierarchically according to "moods." The structural hierarchy of the profiles of Herz are by time window only.

Next, the Examiner addresses the applicant's hypothetical example of a first Herz *profile* including the preferences for "action" "violence" and "R-rated" from 7:00 to 11:00 p.m., and a second Herz *profile* including the preferences of "news" "documentaries" "weather" from 5:00 pm to 8:00 pm, etc. The applicant pointed out that

in such an example, none of the substantive characteristics of the profiles would overlap, hence would not disclose the applicant's limitations that the first hierarchical level of preferences encompass all the preferences of the second level. The Examiner's response is first to assert that the "example used by the applicant refers to the genre preferences and not the moods." This assertion by the Examiner is false on its face; as noted earlier the "moods" of Herz are the equivalent of profiles, each containing preferences, *exactly* as the applicant structured the foregoing example. The applicant is also puzzled by this rebuttal by the Examiner, given that it is the Examiner's very position that the claim term "preferences", whether genre preferences or otherwise, *reads on* the moods of Herz. It makes little sense for the Examiner to then object on the basis of some distinction between "moods" and "preferences" once the applicant notes that the moods of Herz are not arranged in the type of hierarchy claimed by the applicant.

The Examiner also contends that "the moods [of Herz] are hierarchical as they are nested." This contention misses the point. The moods or profiles of Herz are *nested only by time window*, i.e. a first profile occupying a time window of 8:00 am to midnight might have a nested profile from 5:00 pm to 7:00 pm beneath it. The applicant, however, did not simply claim preferences that were hierarchically arranged, but instead further defined the claimed hierarchy by limitations that do not read on the *temporal* nesting of Herz.

Next, the Examiner argues that:

The applicant argues that the moods disclosed by Herz cannot be considered preferences as specific values cannot be assigned to them. Herz discloses that the moods can be assigned a higher value, depending on how many subsets of moods are used (col. 18 lines 6-17). Also, as Herz discloses that preference information can be assigned a negative value (col. 10 lines 31-63) and the Examiner interprets this example [as] corresponding to the moods, as a violent mood would cause a romantic comedy to receive a negative rating for that time period.

*See* Office Action dated February 22, 2008 at p. 3. At the outset, the Examiner seriously misconstrues the applicant's argument to which this rebuttal is addressed. The applicant had argued that Herz discloses profiles (or moods) that contain preferences, and that the

Examiner was attempting to read the applicant's claim term "preferences" *first* on the profiles of Herz (because the profiles are hierarchical) but then switched midstream to later cite the disclosure of Herz relating to the *content preferences within the profiles* so as to find the claim limitation of *positive/negative values*. Specifically, the applicant argued that

the Examiner is inconsistently applying the claim term "preferences" - first to the moods/profiles of Herz, but later to the specific characteristics within those moods/profiles that are assigned values. This inconsistent claim reading is self-contradictory. Initially, the Examiner asserts that the claim term "preferences" are disclosed by Herz's moods, and argues that these moods are arranged hierarchically. But the moods of "peaceful", "speculative" or "violent" are not assigned selective ones of Herz's positive or negative values – *it is the characteristics within these profiles that are assigned such values*. Thus, for the Examiner to find in the prior art applicant's later limitations regarding expressing preferences either in positive, negative, or neutral terms, the Examiner foregoes the earlier assertion that it is the "moods" of Herz that are the claimed "preferences" and instead redefines that term as reading upon the specified content characteristics contained within those moods. An Examiner's rejection, however, cannot be premised on such a flexible approach to claim interpretation. The Examiner is required to pick one of these mutually exclusive interpretations of the term "preferences" and apply it *consistently throughout the entire claim*.

*See* Amendment dated January 17, 2008 at p. 16.

Thus, the applicant did not simply argue that the "moods" of Herz cannot be assigned specific values, the applicant argued that the moods of Herz did not take on both positive and negative values. Furthermore, the Examiner's own rebuttal once again proves the applicant's point. The first passage of Herz cited by the Examiner, i.e. col. 18 lines 6-16 discloses "satisfaction factors" that begin with a value of "1" for the generic profile – the profile with the broadest profile, and are otherwise inversely proportional to the size of the time window for other profiles. Thus, the satisfaction factor of a profile *must be greater than or equal to 1*, and therefore does not disclose a preference being assigned a "negative value."

The second passage of Herz cited by the Examiner, i.e. col. 10 lines 31-63 does disclose positive and negative values, but these values are assigned to the individual

content preferences within the profiles of Herz, exactly as previously argued by the applicant. The Examiner may be conflating these two disclosures to somehow argue that a negative value attached to a preference would somehow affect the satisfaction factor of the profile to which it is included. Herz in fact contradicts this position; the satisfaction factor is solely a function of the length of the time window of the profile to which it is associated, and is *always positive*.

Similarly, the Examiner's assertion that a "violent mood would cause a romantic comedy to receive a negative rating for that time period" is neither relevant, nor supported by any actual disclosure in Herz. First, the system of Herz has no way of identifying a "violent" mood as such, but instead must solely rely on the respective ratings of the specific content preferences in the profiles valid for the pending time slot. Second, the claim limitation at issue requires "preferences" that are selectively assigned positive or negative values.<sup>1</sup> The Examiner seems to be arguing that a "violent" mood might cause a *delivered program* to be assigned a negative value, but this has no bearing on which is claimed. For the Examiner's analogy to make sense, there must be some disclosure in Herz that would assign a negative value to the "violent" profile itself. Herz contains no such disclosure.

Next the Examiner's response states that:

The applicant argues that the moods disclosed by Herz are not hierarchical as they do not encompass the moods of which they are a subset. As Herz discloses where the moods are subsets of each other (column 17 lines 52-61), the Examiner interprets this as each mood including the preference from the mood above it, as without this structure there would be no reason to have the moods be a subset of each other.

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<sup>1</sup> Again, the applicant does not contest that Herz discloses "preferences" that are capable of being assigned positive and negative values, but it is the Examiner who *chooses not* to read the *claimed* term "preferences" on the "preferences" as defined by Herz, because the latter are not organized in a hierarchical fashion. Instead, the Examiner elects to read the claimed term "preferences" on the *profiles* or "moods" of Herz, so as to contend that Herz discloses preferences arranged hierarchically (though as noted earlier, not in the specific hierarchy claimed). The cited portion of Herz at col. 10 lines 31-63 is *not relevant* because it does not teach limitations relating to the values attached to the moods/profiles of Herz, e.g. the satisfaction factor. For example, if a profile or mood of Herz were to include five preferences, two with negative ratings, and three with positive ratings, the rating or value of the profile itself (satisfaction factor or otherwise) has no relationship whatsoever to the values of the preferences it contains.

See Office Action dated February 22, 2008 at p. 3.

Here the Examiner seems to interpret the applicant's claim limitation *backwards*. As claimed, the higher order level (the first level) must include preferences that together encompass all preferences of the level below it (the second level). The Examiner is arguing that the lower level profile of Herz (the one with the narrower time window) must include all the preferences of the higher level profile (the one with the broadest time window). First, as just noted, the Examiner's argument is not directed to the arrangement claimed. Second, the Examiner's argument is illogical; the mere fact that the preferences of the first profile (the one with the broadest time window) are still *operative* while the second profile is *also operative*, is not indicative of a *structural arrangement* where one profile includes preferences encompassing all those of the other profile. This claimed structural arrangement is not disclosed by Herz.

Finally, the applicant notes that the Examiner appears to be misinterpreting the claim language of "jointly processing" the respective preferences of the first and second levels of the user preferences, and "jointly processing" the respective preferences of the first and second levels of the program attributes, as instead claiming "jointly processing" the preferences with the program attributes. *See* Office Action dated February 22, 2008 at p. 7 (arguing that the combination of Herz and Finseth disclose the limitations claimed because the program attributes of Finseth would be included in the agreement matrix of Herz). This is not what is being claimed. Having said that, claim 1 has been amended to clarify this distinction. Other limitations found in claim 1 (as well as the other independent claims 10, 25, 50, 57, and 60) have also been amended for grammar and clarity.

For each of the foregoing reasons, independent claim 1 is patentably distinguished over the cited prior art, and the applicant respectfully requests that the rejection of this claim be withdrawn.

#### **B. Independent claims 10, 25, 50, 57, and 60**

Each of claims 10, 25, 50, 57, and 60 includes limitations that distinguish the respective claims for reasons already discussed with respect to claim 1. In addition, the

applicant had previously noted that claim 57 included several limitations ignored throughout the Examiner's rejection, i.e. (1) "determining a first value based upon, at least in part, whether a first portion of said user attribute information matches a portion of said program attribute information;" (2) "determining a second value based upon, at least in part, whether a second portion of said user attribute information matches a portion of said program attribute information;" (3) "if at least one of said first value or said second value indicates non-desirability of said at least one of audio and video, discarding said at least one of said audio and video;" and (4) "if said at least one of audio and video is not discarded as a result of step (d) then determining a third value based upon, at least in part, said first value and said second value."

The Examiner argues that "claim 1 contains the limitation of selecting programming based on the preferences, and this would also cover disregarding programs" because programs must be inherently discarded by any program selection tool. This may well be true, but the limitations just recited claim *specified steps for deciding* which programs are to be discarded, and the Examiner makes no effort to show where these steps are found in the prior art. Where, for example, does any cited reference, disclose the step of "determining a third value" if an audio or video is not selected, and which is also based on the claimed "first" and "second" values? For that matter, where does any cited reference even disclose the claimed steps of determining the claimed first and second values "based on whether . . . user attribute information matches a portion of said program attribute information"? The Examiner's argument seems to be that, simply because claim 1 is broad enough to encompass the specific limitations recited in claim 57, that the rejection of claim 1 is sufficient to also reject claim 57. This is obviously illogical, as such reasoning would obviate any need on the part of an Examiner to specifically reject any dependent claim after rejecting the independent claim upon which it depends.

For each of the foregoing reasons, each of independent claims 10, 25, 50, 57, and 60 are patentably distinguished over the cited prior art, and the applicant respectfully requests that the rejection of these claims be withdrawn.

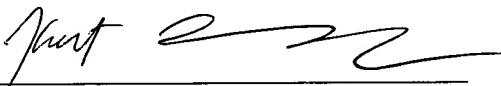
**III. Rejection of Dependent claims 2-9, 11, 13-15, 26-28, 51-53, 59, and 61-64.**

Each of these dependent claims depends from a respective one of independent claims 1, 10, 25, 50, 57, and 60, and are therefore patentably distinguished over the cited prior art for the same reasons as the independent claim from which each respectively depends. The applicant thus requests that the respective rejections of these claims be withdrawn.

**IV. Conclusion**

In view of the foregoing amendments and remarks, the applicant respectfully requests reconsideration and allowance of claims 1-11, 13-15, 25-28, 50-53, 57 and 59-64.

Respectfully submitted,

  
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